



SUPREME COURT OF CANADA

CITATION: Halifax (Regional Municipality) v. Canada (Public Works and Government Services), 2012 SCC 29

DATE: 20120615

DOCKET: 33876

BETWEEN:

Halifax Regional Municipality

Appellant

and

**Her Majesty The Queen in Right of Canada, as represented by the Minister of
Public Works and Government Services**

Respondent

- and -

**City of Toronto, Federation of Canadian Municipalities, Association of
Canadian Port Authorities and City of Québec**

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 59)

Cromwell J. (McLachlin C.J. and LeBel, Deschamps, Fish,
Abella, Rothstein, Moldaver and Karakatsanis JJ.
concurring)

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

HALIFAX (REGIONAL MUNICIPALITY) v. CANADA

Halifax Regional Municipality

Appellant

v.

Her Majesty The Queen in Right of Canada,
as represented by the Minister of Public
Works and Government Services

Respondent

and

City of Toronto,
Federation of Canadian Municipalities,
Association of Canadian Port Authorities and
City of Québec

Interveners

Indexed as: Halifax (Regional Municipality) v. Canada (Public Works and Government Services)

2012 SCC 29

File No.: 33876.

2011: December 12; 2012: June 15.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

Crown law — Real property and immoveables — Taxation — Payments in lieu of taxes — Minister's valuation of Halifax Citadel National Historic Site millions of dollars lower than value determined by local assessment authority — What is the scope of Minister's discretion to determine "property value" for purposes of making payments in lieu of taxes — What standard of judicial review applies to determination — Was Minister's determination of property value reasonable? — Payments in Lieu of Taxes Act, R.S.C. 1985, c. M-13, ss. 2(1) and 4(1) — Assessment Act, R.S.N.S. 1989, c. 23, s. 42(1).

Under the *Payments in Lieu of Taxes Act* (the Act), the Minister of Public Works and Government Services may make payments in lieu of taxes (PILTs) with respect to federally owned property, which is constitutionally exempt from provincial and municipal property taxation. The Minister made PILTs to Halifax with respect to the Halifax Citadel National Historic Site on the basis of a valuation of the site with which Halifax disagreed. Halifax and the Minister were able to agree on the value of the eligible improvements on the site, but not on the value of the structures called casemates and demi-casemates or of the land on the Citadel site. The matter was referred to a dispute advisory panel, which advised the Minister that the land beneath the casemates and demi-casemates should be valued at \$1,550,000 while the 42 acres of land beneath a grassy slope called the glacis should be valued at a nominal \$10. It also provided a valuation for the casemates and demi-casemates. The Minister

accepted the Panel's advice and made further PILTs in accordance with it. Halifax applied for judicial review in the Federal Court, saying the valuation of the land and of the casemates and demi-casemates was unreasonable and the court agreed. This decision was reversed with respect to the land by a majority of the Federal Court of Appeal. The present appeal relates only to the valuation of the land.

Held: The appeal should be allowed and the matter remitted to the Minister for redetermination.

The Minister's role under the Act is not to review the assessment authority's assessment; the Minister's function with respect to the value of federal property is to reach an opinion about the value that would be attributed by an assessment authority if the property were taxable. This is done in the context of exercising the discretion to make a PILT that must not exceed the product of the effective rate of tax and the property value as per the Act. While the view of an assessment authority is an important reference point for the Minister, in reaching his or her opinion the Minister is entitled to make an independent determination of the value that would be attributed to the federal property by a local assessment authority.

The Minister's opinion must be informed by the tax system that would apply to the federal property in issue if it were taxable. Provided that the Minister applies the correct legal test, his or her exercise of discretion is judicially reviewed for reasonableness.

The Minister's decision in this case is unreasonable. It is unreasonable, first, because the manner in which the Minister formulated his opinion was inconsistent with his obligation to form an opinion about the value that would be established by an assessment authority. The Minister attributed nominal value to the land under the glacis solely on the basis of the impossibility of developing it. Not only did the Minister not adopt the approach which the relevant assessment authority actually would apply to value the property, but he also had evidence before him, apparently not contradicted, that other Canadian assessment authorities would not attribute nominal value to land on the basis of use restrictions resulting from a national historic site designation. And there was no evidence that any assessment authority would do so. The Minister cannot base his valuation on a fictitious tax system that he himself has created, but that is exactly what happened in this case.

The Minister's opinion is also unreasonable on a second ground: in coming to his decision the Minister frustrated the purposes and policies of the Act. The Minister adopted a categorical approach to valuation under which federal property is valueless if its status as a national historic site prevents its development or commercial use. In doing so he defeated Parliament's purpose in including national historic sites within the PILT scheme. The Minister's approach had the effect of frustrating the very legislative scheme under which the power is conferred.

The Minister's position is also at odds with the broader policy of the Act, which is to treat municipalities fairly. It can hardly be thought either fair or equitable

to conclude that 42 acres in the middle of a major metropolitan centre has no value for assessment purposes.

Cases Cited

Applied: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427; **referred to:** *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Notre-Dame-de-l'Île-Perrot (Paroisse de) v. Société générale des industries culturelles*, [2000] R.J.Q. 345; *Québec (Communauté urbaine) v. Fondation Bagatelle Inc.*, 2001 CanLII 15060; *Gander International Airport Authority Inc. v. Gander (Town)*, 2011 NLCA 65, 313 Nfld. & P.E.I.R. 125; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539.

Statutes and Regulations Cited

Assessment Act, R.S.N.S. 1989, c. 23, s. 42(1).

Canada National Parks Act, S.C. 2000, c. 32.

Constitution Act, 1867, s. 125.

National Historic Sites of Canada Order, C.R.C., c. 1112, Sch., s. 1.

Payments in Lieu of Taxes Act, R.S.C. 1985, c. M-13, ss. 2(1) “effective rate”,
“federal property”, “property value”, (3), 2.1, 3(1)(a), 4(1), 11.1, 15, Sch. II,
s. 4.1 [ad. SOR/2001-494, s. 23].

*Regulations Amending Certain Regulations made under the Payments in Lieu of
Taxes Act and Schedules I to III to that Act*, SOR/2001-494, s. 23.

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and
Evans and Sharlow JJ.A.), 2010 FCA 196, [2012] 1 F.C.R. 304, 405 N.R. 133, 321
D.L.R. (4th) 638, 7 Admin. L.R. (5th) 213, 71 M.P.L.R. (4th) 176, 94 R.P.R. (4th) 15,
[2010] F.C.J. No. 950 (QL), 2010 CarswellNat 2417, reversing in part a decision of
Phelan J., 2009 FC 670, 346 F.T.R. 264, 61 M.P.L.R. (4th) 187, 85 R.P.R. (4th) 52,
[2009] F.C.J. No. 842 (QL), 2009 CarswellNat 2045. The appeal should be allowed
and the matter remitted to the Minister for redetermination.

Daniel M. Campbell, Q.C., and Joseph F. Burke, for the appellant.

Ginette Gobeil and René LeBlanc, for the respondent.

Diana W. Dimmer and Angus S. MacKay, for the intervener the City of Toronto.

Marie-France Major, for the intervener the Federation of Canadian Municipalities.

Harley J. Harris and Michael F. Robson, for the intervener the Association of Canadian Port Authorities.

Richard Grondin and Éric Boisvert, for the intervener the City of Québec.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The Minister of Public Works and Government Services has determined that roughly 40 acres of the Halifax Citadel National Historic Site of Canada has only nominal value for the purposes of municipal taxation. The main issue on this appeal is whether the Minister's determination was reasonable. In my respectful view it was not.

[2] Property owned by the Federal Crown is constitutionally exempt from provincial and municipal taxation. However, in the interest of fairness, Parliament has established a regime of discretionary payments in lieu of taxes (“PILTs”) to provinces and municipalities: *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13. The Minister has discretion to make these payments and as to their amount. However, any payment must not exceed what, in the Minister’s opinion, would be payable if the applicable local rate of tax were applied to the property value as determined by the local assessment authority: ss. 2(1) and 4(1) of the Act.

[3] The Minister has exercised his discretion to make PILTs to Halifax in respect of eligible parts of the Citadel; to do so on the basis of the full value of those aspects of the property that are subject to the Act; and to use the rate of taxation identified as the applicable one by the local assessment authority. What remains contentious between the Minister and Halifax is the value of the property.

[4] It follows, therefore, that only one, quite narrow aspect of the Minister’s discretion is in issue here. This appeal does not concern the Minister’s exercise of discretion to decide whether to make PILTs. It does not concern his discretion to decide whether those PILTs should be for an amount less than the maximum permitted by the Act or his discretion to determine the rate that would be applied by an assessment authority. The appeal concerns *only* the Minister’s determination of “property value”.

[5] The Minister in this case decided that a national historic site is effectively valueless if it does not support economically beneficial uses. He therefore concluded that roughly 40 acres of the Citadel site are worth ten dollars. This conclusion, in my view, is unreasonable for two reasons. First, the property value is to be the value which, in the Minister's opinion, the local assessment authority would apply to the property: s. 2(1), "property value". However, in valuing the property the Minister adopted an approach which the record discloses no example of a Canadian assessment authority using, and which significantly differs from the approaches that the record suggests assessment authorities in provinces across the country do use. The Minister's opinion that the value he arrived at "would be attributable by an assessment authority" has no basis in and is contrary to the evidence. Second, the Minister's decision is inconsistent with the Act's purpose. The Act permits payments for national historic sites. To decide that these sites have no value for taxation purposes except to the extent that they could support commercial uses negates the very purpose of their inclusion in the PILT scheme. For these two reasons the Minister's decision was unreasonable.

II. Brief Overview of the Proceedings and Issues

[6] Halifax disagreed with the Minister's valuation of parts of the Citadel for PILT purposes. As provided for by the Act, the matter was referred to the PILT Dispute Advisory Panel, which advised the Minister that the land beneath fortification structures called casemates and demi-casemates should be valued at \$1,550,000 while

the 42 acres of land beneath a grassy slope called the glacis should be valued at a nominal \$10. This resulted in a total valuation of the land on the site that was millions of dollars lower than the value arrived at by the local assessment authority.

[7] The Minister accepted the Panel's advice. Halifax applied for judicial review in the Federal Court, saying this was unreasonable. The court agreed: 2009 FC 670, 346 F.T.R. 264. This decision was reversed in part by a majority of the Federal Court of Appeal: 2010 FCA 196, [2012] 1 F.C.R. 304. Halifax now appeals to this Court.

[8] The appeal raises two issues:

1. What is the scope of the Minister's discretion to determine "property value" for the purpose of making PILTs, and what standard of judicial review applies to his determination?
2. Was the Minister's determination of the value of the land on the Halifax Citadel site reasonable?

[9] It will be helpful first to put these issues in the context of the statutory framework, the relevant facts and the decisions leading to this appeal. I will then turn to the standard of judicial review and how it applies in this case.

III. The Statutory Framework

[10] Under s. 125 of the *Constitution Act, 1867*, the Federal Crown is exempt from provincial and municipal taxes. This constitutional exemption has the potential to cause unfair adverse effects to municipal revenue — unfairness that Parliament has attempted to mitigate with the Act. As stated in s. 2.1, the purpose of the Act “is to provide for the fair and equitable administration of payments in lieu of taxes”. Paragraph 3(1)(a) of the Act provides that the Minister “may” make payments “in lieu of a real property tax for a taxation year”. The amount of this payment shall not exceed the amount determined by multiplying the “property value” by the applicable “effective rate” of taxation: s. 4(1). Subsection 2(1) defines these two terms as follows:

2. (1) In this Act,

...

“effective rate” means the rate of real property tax or of frontage or area tax that, in the opinion of the Minister, would be applicable to any federal property if that property were taxable property;

...

“property value” means the value that, in the opinion of the Minister, would be attributable by an assessment authority to federal property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property;

As noted, the applicable effective rate is not in dispute in this case. What is in dispute is the value that in the opinion of the Minister would be attributable by an assessment authority to the property if it were taxable.

[11] Improvements on federal land as well as federal land itself are subject to PILTs except where they are rendered ineligible by s. 2(3) and its associated schedule.

[12] In this case, the relevant “assessment authority” at the time was the Nova Scotia Director of Assessment, appointed under the *Assessment Act*, R.S.N.S. 1989, c.

23. The statute directs that property be valued according to market value:

42 (1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that, subject to Section 45A, taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality.

[13] In instances in which the Minister and the local taxing authority disagree on valuation, the Minister can refer the matter to an advisory panel, which will provide him or her with advice: s. 11.1 of the Act. As we shall see, that is what occurred here.

IV. Facts

[14] The Halifax Citadel, a federally owned property, is an approximately 48-acre site in the middle of downtown Halifax. The site served military purposes from the time of Halifax's foundation in 1749 until the end of the Second World War. Now it is zoned as a "Park and Institutional Zone" by Halifax and is also designated as a national historic site under *National Historic Sites of Canada Order*, C.R.C., c. 1112, Sch., s. 1, passed under the *Canada National Parks Act*, S.C. 2000, c. 32. The parties agree that its highest and best use is as a national historic site. Operating as such a site, the Citadel is subject to stringent use and development restrictions.

[15] Not everything on the site is eligible for PILTs and what is eligible has changed over time. It is necessary therefore to describe the site in terms of its various components. There are currently "eligible improvements" that qualify for PILTs; components that formerly were but are no longer "eligible improvements"; "ineligible improvements" that are excluded from the ambit of the Act; and the land under each of these components. The components on the site that are eligible — that is, the eligible improvements and all of the land — fall under the s. 2(1) definition of "federal property", which includes "real property and immovables owned by Her Majesty in right of Canada that are under the administration of a minister of the Crown". The improvements that are ineligible are listed in s. 4.1 of Sch. II of the Act and are thus excluded from the definition of "federal property" as per s. 2(3)(b) of the Act. The components of the site are as follows:

1. The eligible improvements: These include the kiosks, the buildings containing office space, some buildings containing storage space, a movie theatre and the town clock, which are themselves eligible for valuation for the purposes of PILTs. The parties have agreed to the value of these improvements at \$2,233,550 for the 2005 taxation year; this value has been adjusted for other taxation years. The valuation of the eligible improvements is not an issue before this Court.

2. The formerly eligible improvements referred to as the casemates and demi-casemates: These are structures built into the fortress ramparts which were used originally for storage. It is common ground that they were “eligible improvements” subject to valuation for the purposes of PILTs from 1997 to 2000, at which time they ceased being eligible improvements because of the addition (SOR/2001-494, s. 23) of s. 4.1 to Sch. II to the Act. The valuation of these structures, therefore, only has any effect on the PILTs for 1997 to 2000. Both the Federal Court and the Federal Court of Appeal concluded that the Minister’s assessment of their value was unreasonable and that finding is not challenged in this Court.

3. The glacis: This is the land sloping down from the fortification. It served to expose enemy troops to fire as they approached the

fortress, or at least would have done had the Citadel ever come under attack. The glacis itself, like most of the fortifications, is an ineligible improvement by virtue of its inclusion in s. 4.1 of Sch. II to the Act.

4. The land beneath the eligible improvements: This land takes up approximately 19,000 square feet.

5. The land beneath the formerly eligible improvements (the casemates and demi-casemates): This land takes up approximately 60,000 square feet.

6. The land beneath the glacis: This is, like the land beneath the eligible improvements and the land beneath the casemates and demi-casemates, subject to valuation for the purposes of PILTs. This land takes up approximately 42 acres. Although this appeal concerns the valuation of all the land on the site, it is the land under the glacis that is at the heart of the matter.

[16] The local assessment authority valued the entire site at between \$36,000,000 and \$40,280,100 between 1997 to 2007. The Minister made PILTs in respect of these years, however, on the basis of values ranging between \$5,250,000 and \$5,330,000. Halifax objected to this. Halifax and the Minister were able to agree on the value of the eligible improvements, but not on the value of the casemates, the demi-casemates or the land on the Citadel site. The Minister referred the matter to

the Panel. The Panel was requested to value the casemates and demi-casemates for the purposes of the 1997 taxation year, and the land for the 2005 taxation year. If the Minister accepted the Panel's figures for these two years, he would use them to arrive at values for the other relevant years. The Panel heard witnesses and considered expert reports. The reports are in the record before this Court, but no transcript of the testimony at the hearing was made.

[17] It is common ground that the Panel's decision should be treated as the Minister's decision for the purposes of judicial review.

[18] The Panel had before it two very different approaches to valuation, one advanced by Halifax and the other by Canada. At the risk of over-generalization, the main difference between the approaches was this. Halifax used as the basis of its appraisal the market value of surrounding property with various adjustments, but gave little weight to the use restrictions inherent in the historic site designation. Canada, for its part, took as its starting point that the use restrictions rendered the property effectively valueless except to the extent that it could actually support commercial uses. It appears that the Panel basically adopted the latter view. However, because the reasons given by the Panel are quite unsatisfactory in important respects and, on the critical point, non-existent, it is necessary to give a summary of the two positions which were advanced before it.

[19] Halifax's principal expert witness was Kathy Barss, who worked with the Assessment Services Division of Service Nova Scotia and Municipal Relations,

effectively the “assessment authority” in this case. She came to her valuation of the land on the basis of a direct comparison approach, by reference to the sale price of 22 Halifax sites which she considered comparable, that is, which were close to the Citadel site and were either vacant or intended to be developed. This approach accorded, in her opinion, with the requirements of s. 42(1) of the *Assessment Act*. She took the view that neither the site’s municipal zoning nor its designation as a national historic site should have any effect on valuation. She examined various historic sites from across the country to see whether local assessment authorities had discounted their values to account for use restrictions arising from their status as historic sites. She concluded that this had happened only in New Brunswick. She also noted various sales in Nova Scotia of properties that were intended to be preserved for public purposes, but for which the sale price was comparable to other properties bought without such restricted uses in mind.

[20] In order to value the land she divided the site into two zones. She valued the first zone, 8.18 acres closest to the downtown business district of the city, at \$19.25 per square foot. She valued the second zone, the remaining 39.86 acres, at \$7.00 per square foot. Using these values she came to a total of \$19,000,000 for the entirety of the land on the site.

[21] A second witness testified on Halifax’s behalf on the valuation of the casemates and demi-casemates. He took the view that they should be valued in accordance with their replacement value less depreciation, and that there should be no

devaluation to account for functional obsolescence. Such devaluation would be inappropriate since the casemates and demi-casemates were serving the function of a living history museum. He came to a valuation of \$7,315,900.

[22] Canada's expert considered the Citadel site's highest and best use to be relevant to the site's valuation, and relied on a document he had written on the "Best Practices" for the valuation of historic sites. Both Halifax's principal expert and Halifax's Director of Legal Services and Risk Management testified that neither Halifax nor Nova Scotia accepted or used the approach embodied in this document. Canada's expert testified, though, that his appraisal was also consistent with more traditional methods of valuation, and he purported in his report to use a market comparison approach.

[23] His selection of appropriate comparator sales depended heavily on the Citadel site's use restrictions and development potential. The only land to which he attributed significant value was the approximately 19,000 square feet of land under the eligible improvements. He valued this land by comparison with other plots of land with similar uses, and came to a value of \$286,000. He valued the land under the ineligible improvements, including under the glacis and under the casemates and demi-casemates, at a nominal ten dollars to account for the severe restrictions on that land's use. In coming to this nominal value he relied in part on the comparator examples of four transfers of historic sites in Nova Scotia between the federal and

provincial governments. He did not provide an estimate of the value of the casemates or demi-casemates.

[24] In its report the Panel rejected almost all of Halifax's expert's suggested comparator sales because she had not taken into account differing highest and best uses, differing permitted density of development or the use restrictions on the Citadel site. In essence, the Panel's view was that the use restrictions inherent in the historic site designation had to be taken into account in determining market value. Despite expressing some reservations about Canada's expert's reliance on his "Best Practices" document, which had not yet garnered approval in the assessment community, the Panel saw merit in his focus on development potential, since this has a strong effect on market value. However, the Panel rejected the comparator sales that he had selected for the land under the glacis.

[25] Proceeding on the basis that the restrictions imposed on the Citadel site were highly relevant to its valuation the Panel accepted only one of Halifax's expert's comparator sales, which related to similarly zoned land. The Panel used it to value the land under the casemates and demi-casemates at \$21.10 per square foot. To this the Panel added, with no explanation, \$4.56 per square foot in demolition costs, for a total land valuation of \$1,550,000.

[26] The Panel gave the casemates and demi-casemates a value of \$8,515,500 when new, and subtracted amounts for physical depreciation and functional obsolescence to account for their current underuse. This gave them a final

value of \$2,556,200. As noted, the courts below have found the Panel's valuation of these structures to have been unreasonable, a finding not under appeal to this Court.

[27] The land, casemates and demi-casemates therefore came to a total value of \$4,106,200.

[28] In a supplementary report the Panel added ten dollars to its figure for the land, with no explanation. The parties agree that this added amount must have been intended to represent the value of the land under the glaciis, as revealed by its accordance with the figure Canada's expert gave for it and by the Panel's failure to value it in its first report.

[29] On the basis of a four-page memorandum from the Deputy Minister, the Minister adopted the report's conclusions. To the Panel's final value the Minister added an amount to account for the value of the eligible improvements and the value of the 19,050 square feet of land under them. The latter value was calculated using the per-square-foot value the Panel had set for the land under the casemates and demi-casemates: July 29, 2008 letters from the Minister to the Mayor of Halifax and the Chief Administrative Officer of Halifax, A.R., vol. I, at pp. 22-23; Report to the Minister, A.R., vol. I, at p. 30. The Minister made additional PILTs for 1997 to 2007 on the basis of the newly accepted valuation of the site.

V. Judicial Review

A. *The Decision of the Federal Court, 2009 FC 670, 346 F.T.R. 264*

[30] Phelan J. heard Halifax's application to the Federal Court for judicial review of the Panel Report and of the Minister's adoption of it. He quashed the Minister's decision and remitted it to him for redetermination. The reviewing judge took the view that where an assessment authority has performed an assessment the Minister should deviate from it only where the assessment authority's conclusion is unreasonable or unsupportable: para. 46. In this case the Panel had erroneously performed its own valuation, rather than inquiring into the reasonableness of the assessment authority's: para. 50. Phelan J. also considered the Panel's valuation of the land and casemates and demi-casemates to be unreasonable. The valuation did not find adequate justification in the Panel's report and was inconsistent with the site's highest and best use as a national historic site: paras. 57-64.

B. *The Decision of the Federal Court of Appeal, 2010 FCA 196, 405 N.R. 133*

[31] The Minister appealed. In the Federal Court of Appeal, Evans J.A. (Blais C.J. concurring) found that the Minister's decision with regard to the value of the land was reasonable, but upheld Phelan J.'s conclusion that the decision regarding the casemates and demi-casemates was not. Sharlow J.A. dissented in part and would have upheld Phelan J.'s conclusion entirely.

[32] Evans J.A. rejected the submission that the Minister must accept an assessment authority's appraisal unless that appraisal is unreasonable. Rather, the

Minister is entitled to make his own independent determination of value: para. 48. This notwithstanding, the Minister's determination must represent his opinion on the value that the relevant authority would attribute to the property in question. In this instance the Panel had correctly understood its mandate: paras. 58-59.

[33] Evans J.A. considered the Panel's reasons, read in conjunction with Canada's expert report, to have adequately explained the attribution of a higher value to the land under the casemates and demi-casemates and the attribution of nominal value to the land under the glacis: paras. 65-73. Canada's expert had reasoned that the land under the casemates and demi-casemates had value because of the commercially valuable uses to which it could be put for office and storage space. However, as the glacis could not be altered and therefore had no development value, the land under it had no value either: paras. 66-68.

[34] Evans J.A. saw no adequate basis in the Panel's reasons for reducing the casemates' and demi-casemates' value to account for disuse. He noted that the Panel's reasons were silent about why it rejected Halifax's evidence that underuse was irrelevant in view of the casemates' representational function in the Citadel and further that Canada's expert appeared not to explain why he disagreed with that approach, if he in fact did: para. 75. Evans J.A. therefore remitted the valuation of the casemates and demi-casemates to the Minister: paras. 74-77. As noted, the finding that this aspect of the Panel's decision was unreasonable is not challenged in this Court.

[35] Sharlow J.A. agreed with Evans J.A. on the applicable standard of review and on the unreasonableness of the Panel's valuation of the casemates and demi-casemates. However, she dissented with regard to the valuation of the land, largely for the reasons of Phelan J.: paras. 79-81.

[36] Halifax now appeals on the issue of the valuation of the land on the Citadel site.

VI. Analysis

A. *Standard of Review of the Minister's Decision*

[37] In this instance the Minister has exercised his discretion to make PILTs to Halifax, and to base these PILTs on the full property value of those components of the site that are subject to the Act. It follows that at issue in this appeal are the scope of the Minister's discretion to determine that value, the standard of review applicable to the exercise of this discretion, and the ultimate merits of the Minister's valuation of the land in this case.

(1) The Nature of the Minister's Discretion Under the Act

[38] The reference point for the exercise of the Minister's discretion in making a PILT is the local system of property taxation that would apply to the property if it were taxable. This is evident from the definitions of "effective rate" and

“property value” in s. 2(1) of the Act. The maximum allowable PILT is calculated by multiplying the “effective rate” of tax by the “property value”: s. 4(1). The “effective rate” is the rate of real property tax that in the opinion of the Minister *would be applicable* if the federal property were taxable property: s. 2(1), “effective rate”. The rate that would be applicable refers to the applicable provincial or municipal rate: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at para. 40. The “property value” is the value that in the opinion of the Minister “would be attributable by an assessment authority to federal property . . . as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property”: s. 2(1). Again, the value that would be applicable is that which would, in the Minister’s opinion, be applied by the local assessment authority.

[39] Halifax submits that where the assessment authority has determined the value of the property the Minister is bound by that value unless he or she concludes that the authority’s assessment is unreasonable. This, Halifax says, flows from the definition of “property value” which, as noted, refers to the value that would be attributed to the property by the assessment authority. Phelan J. adopted this position (see FC reasons, at para. 46), while the Federal Court of Appeal rejected it (see FCA reasons, at paras. 48 and 79). I respectfully agree with the Federal Court of Appeal on this point.

[40] The Minister's role under the Act is not to review the assessment authority's assessment; the Minister's function with respect to the value of the property is to reach an *opinion* about the value that *would be* attributed by an assessment authority. This is done in the context of exercising the discretion to make a PILT that must not exceed the product of the effective rate and the property value. While the view of an assessment authority is an important reference point for the Minister, I nonetheless agree with Evans J.A. that in reaching his or her opinion, the Minister is entitled to make an independent determination of the value that would be attributed to the federal property by an assessment authority.

[41] This conclusion finds support in the functional and practical considerations which LeBel J. identified in *Montreal Port Authority*, at paras. 34-35. The calculation of PILTs is not limited to a mechanical application of municipal assessments and tax rates. It must be adaptable to the various locations in which federal properties are situated, and to those properties' circumstances. This is especially so in view of the diverse and sometimes unique nature of federal properties. We need look no further than the Citadel site, 48 acres of 19th-century fortification sitting in the middle of a modern city, for an obvious example. Assessment principles are not self-applying. Legitimate disagreements about how they apply in a particular case are to be expected. There will often be no one, "right" answer. Moreover, the Minister is not in the same situation as an ordinary taxpayer. Where disagreements about an assessment of federal property arise, the Minister cannot take advantage of the assessment appeals processes that would be available to

taxpayers subject to particular municipal or provincial regimes. Finally, it makes sense that within this highly discretionary regime of PILTs — a regime that explicitly preserves the Federal Crown’s constitutional immunity from provincial and municipal taxation (s. 15) — the Minister would be armed with ways to protect federal interests against over-zealous assessment authorities should the need arise.

[42] This is not to say that the Minister’s discretion in valuing federal property is unfettered. In exercising his discretion the Minister must comply with the requirements of the Act: *Montreal Port Authority*, at para. 33. As the s. 2(1) definition of “property value” makes clear, the reference point of the Minister’s opinion on valuation is the value that “would be attributable by an assessment authority to federal property”. Just as fairness to the Federal Crown demands that the Minister retain the discretion to come to his own opinion on property value, fairness to municipalities demands that the Minister’s opinion be informed by the tax system that would apply to the federal property in issue if it were taxable.

(2) The Applicable Standard of Review

[43] The Minister’s decision under the Act is discretionary within the legal framework provided by the legislation, as explained in *Montreal Port Authority*: see paras. 32-38. Provided that the Minister applies the correct legal test, his or her exercise of discretion is judicially reviewed for reasonableness: see *Montreal Port Authority*, at paras. 33-36; and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41. The exercise of discretion must be consistent with

the principles governing the application of the Act and with the Act's purposes: *Montreal Port Authority*, at para. 47. As LeBel J. said in *Lake* in the context of ministerial discretion in relation to extradition, "The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable": para. 41.

[44] Reasonableness review is concerned both with the transparency and intelligibility of the reasons given for a decision and with the outcome of the decision-making process: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47; *Montreal Port Authority*, at para. 38. As Abella J. has recently explained in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para. 14.

B. *Was the Minister's Decision Reasonable?*

[45] Although this appeal concerns the valuation of all the land on the Citadel site, the focus here is the Minister's opinion that an assessment authority would attribute a value of ten dollars to the land under the glaciis. The question is whether that opinion is reasonable. The panel gave no reasons justifying its valuation of the land under the glaciis. In fact, it did not assign it a value in its initial report. It was only in its amended report that the Panel, without explanation, inserted the nominal

amount of ten dollars. However, Evans J.A. inferred that the Panel accepted Canada's expert's reasons for assigning the land under the glaciis this value. Canada's expert wrote in his report that because of the applicable use and development restrictions this land has no economic value to the owner, and so "no value in exchange": A.R., vol. II, at p. 113. He considered the land to be comparable to four pieces of parkland that had been the subject of transfers at nominal value between Canada and Nova Scotia.

[46] Whether the Panel did or did not accept Canada's expert's reasoning is unclear. It is of course to be regretted that such an important point should be ignored in the Panel's report. However, even accepting the view that the Panel should be taken as having adopted the approach of Canada's appraiser, my view is that the decision is unreasonable.

[47] It is unreasonable, first, because the manner in which the Minister formulated his opinion was inconsistent with his obligation to form an opinion about the value that would be established by an assessment authority. Not only did the Minister not adopt the approach which the relevant assessment authority actually *would* apply to value the property, but he also had evidence before him, apparently not contradicted, that *other Canadian assessment authorities would not value the property* in the way he did. And there was *no evidence that any assessment authority would do so*. On that record, the Minister's opinion is in my view unreasonable. The Minister's opinion is also unreasonable on a second ground: by adopting the view that

a national historic site is valueless because it cannot be used for commercial activities, the Minister defeated Parliament's purpose in including national historic sites within the PILT scheme. I will address these two points in turn.

(1) Opinion as to How an Assessment Authority Would Value the Property

[48] The Minister's task with respect to the valuation of property is to form an opinion on the value that "would be attributable by an assessment authority" to the property in question. While, as discussed earlier, the Minister is not bound by the valuation arrived at by the relevant assessment authority, it must nonetheless be a reference point. The difficulty here is that by applying the approach proposed by Canada's appraiser, the Minister attributed nominal value to the land under the glacia solely on the basis of the impossibility of developing it. It is clear, however, that the relevant assessment authority did not take that approach when coming to its view on the market value to which s. 42(1) of the *Assessment Act* refers. Indeed, there was no evidence before the Minister to which we have been referred that *any* assessment authority in Canada uses this approach when valuing sites of this nature. The evidence before the Minister to which we have been referred was in fact to the opposite effect. Halifax's appraiser studied the assessed value of 24 historic sites in eight provinces. She concluded that only in one province was there any reduction in the land value to account for restrictions on use as a result of designation as a national historic site: A.R., vol. II, at p. 43. Moreover, in the case of the one province where such reduction was observed, the reduction rates were between 20% and 50% of the market value of surrounding lands. There is little detail in the record as to why these

assessment approaches were adopted or why the Minister decided to exercise his discretion as he had in these particular cases and I am not suggesting that the Minister was bound by these examples. The important point is that in no case referred to in the evidence, including in the report of Canada's expert, did an assessment authority attribute nominal value to the land on the basis of use restrictions resulting from the national historic site designation. The most before the Panel that pointed in the other direction was Canada's expert's statement that his appraisal had been carried out in conformity with the requirements of the Canadian Uniform Standards of Professional Appraisal Practice. However, this does nothing to suggest with any specificity that his approach of assigning nominal value to historic sites that do not support economic uses has gained approval in the assessment community. In short, there is no evidence before this Court, just as there was none so far as we can tell before the Panel and the Minister, to suggest that, with regard to sites of this nature, *any* assessment authority anywhere in Canada applies the approach to valuation used by Canada's appraiser and relied on by the Minister.

[49] *Montreal Port Authority* (at para. 40) made clear that the Minister cannot base his valuation on a "fictitious tax system" that he himself has created, but that is exactly what happened in this case. In light of the state of the record, the approach advocated by Canada's appraiser cannot be viewed as a reasonable basis on which the Minister could perform his duty to form an opinion about the value that "would be attributable by an assessment authority". Adopting this approach was unreasonable.

(2) Statutory Purpose

[50] The Minister's approach to valuation was inconsistent with Parliament's inclusion of historic sites within the ambit of the Act, and with the purpose behind the existence of the PILT scheme.

[51] As discussed in more detail earlier, the stated purpose of the Act is "to provide for the fair and equitable administration of payments in lieu of taxes": s. 2.1. This is accomplished by reconciling the objective of tax fairness for municipalities with the preservation of constitutional immunity from taxation: *Montreal Port Authority*, at para. 20. The Act requires that property value and tax rates be calculated as if the federal property were taxable property belonging to a private owner: *Montreal Port Authority*, at para. 40. Moreover, the Act and its schedules contain detailed lists of various types of property that are included in or excluded from this scheme. The Citadel falls within the definition of "federal property" in s. 2(1) and, as a national historic site of Canada, it is specifically removed from the exclusions relating to parks in urban areas under s. 2(3)(c).

[52] The Minister's conclusion is fundamentally at odds with this scheme. At the core of his reasoning, it may be inferred, is the proposition that land which, by virtue of its historic site designation, has no development value has only nominal value for PILT purposes. Although the parties agreed that the highest and best use of the property is as a national historic site, the Minister's determination in effect is that its actual use for that purpose has no value. Canada's appraiser, who according to the

majority of the Federal Court of Appeal supplies the unstated rationale for the Minister's opinion, put it this way in his report:

As a National Historic site together with the restrictions imposed by the Municipal Zoning Bylaws and the Municipal Development Plan economically beneficial uses of the land have largely been eliminated, thus rendering the land to be economically idle, effectively economically valueless. [Emphasis added; A.R., vol. II, at p. 131.]

[53] This reasoning, in my respectful view, is inconsistent with the Act's inclusion of national historic sites within the types of federal property eligible for PILTs under the Act, and with the overall purpose of the Act to deal equitably and fairly with Canadian municipalities in relation to payments in lieu of property taxation.

[54] Turning to the first point, Parliament intended that the land on national historic sites of Canada be included in the PILT scheme. That being the case, it is inconsistent with this inclusion to reason in a categorical way, as the Minister did here, that such sites, *by virtue of that status*, have no value for assessment purposes and are therefore ineligible for PILTs under the scheme. I do not suggest that property subject to the Act can never be given nominal value. It is possible, for example, that in some instances an assessment authority would attribute nominal value to the property if it were under its jurisdiction: see, for example, *Notre-Dame-de-L'Île-Perrot (Paroisse de) v. Société générale des industries culturelles*, [2000] R.J.Q. 345 (C.A.); *Québec (Communauté urbaine) v. Fondation Bagatelle Inc.*, 2001 CanLII 15060 (Que. C.A.), leave to appeal to SCC refused [2002] 3 S.C.R. xii;

Gander International Airport Authority Inc. v. Gander (Town), 2011 NLCA 65, 313 Nfld. & P.E.I.R. 125. But implicit in the Minister's decision in this case is that any land on a national historic site which, for that reason, cannot be developed or support economically productive use has no value. A categorical position such as this fundamentally contradicts Parliament's purpose in making national historic sites subject to the Act.

[55] Discretion conferred by statute must be exercised consistently with the purposes and policies underlying its grant: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 46; see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65; *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, at p. 174; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at paras. 39-45.

[56] In my respectful view, the Minister's exercise of discretion was contrary to both the purposes and the policy of the Act. Parliament's purpose in including national historic sites within the ambit of the Act was to allow the Minister to make PILTs in respect of such sites, which should be valued under an approach that is conducive to this purpose. It cannot accord with the statutory purpose to accept that the Minister can undercut this inclusion by adopting a method of valuation that renders it meaningless. The Minister's approach "had the effect of frustrating the

very legislative scheme under which the power is conferred”: *C.U.P.E v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 174 (internal quotation marks omitted). It was therefore unreasonable.

[57] The Minister’s position is also, in my view, at odds with the broader policy of the Act, which is to treat municipalities fairly. It can hardly be thought either fair or equitable to conclude that 42 acres in the middle of a major metropolitan centre has no value for assessment purposes. While admittedly applying market value assessment principles to an historic site is a challenging enterprise, the conclusion that an historic site has no value because it cannot be developed or used in an economically productive way is “out of sync” with the equitable purpose of the PILT scheme. Of course, the presence of an historic site doubtless has spin-off benefits for the community in which it is located. But the Act is directed to fair and equitable PILTs with reference to what taxes would be payable if the site were taxable. The Minister’s approach in my view unreasonably departs from that purpose.

[58] It is a challenging task to determine the market value for appraisal purposes of a property whose highest and best use is as a national historic site. While I have concluded that the Minister’s approach to this task was unreasonable on the record before him, nothing that I have said in my reasons is intended to approve or adopt any particular approach to this appraisal conundrum or to suggest that the Minister, in order to act reasonably in this case, was obliged to adopt the appraisal method put forward on behalf of the municipality or was required to ignore the use

restrictions inherent in the property's highest and best use as a national historic site. What will constitute a reasonable approach on the part of the Minister depends on the evidence placed before him in the particular case, viewed through the lens of his statutory duties under the Act and in light of the reasons which he gives for the particular exercise of his statutory discretion.

VII. Disposition

[59] I would allow the appeal and remit this matter to the Minister for redetermination. Should the Minister refer this matter to a Panel, it must be differently constituted. Costs are awarded to the appellant throughout.

Appeal allowed with costs.

Solicitors for the appellant: Cox & Palmer, Halifax.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

Solicitor for the intervener the City of Toronto: City of Toronto, Toronto.

Solicitors for the intervener the Federation of Canadian Municipalities: McMillan, Ottawa.

Solicitors for the intervener the Association of Canadian Port Authorities: Owen Bird Law Corporation, Vancouver.

Solicitors for the intervener the City of Québec: Giasson et associés, Québec.